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Supreme Court of the United States

OCTOBER TERM, 1949.

No. 245.

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a Utah Corporation Sole, *Appellant*,

v.

CITY OF PORTERVILLE, a Municipal Corporation, et al, *Appellees.*

REPLY TO ANSWER TO PETITION FOR REHEARING.

PRELIMINARY STATEMENT.

The appellees in answer to the petition for rehearing rely upon this court's dismissal of the appeal, arguing that the court appraised the substantiality of the reasons advanced in support of the Porterville ordinance, and claiming that:

> "previous decisions of this court foreclose the subject and leave no room for inference that the questions sought to be raised can be the subject of the controversy under the Federal Constitution." (See page 2, Answer to Petition for Rehearing.)

May we respectfully ask, "What decisions?" Are there decisions which the court and appellees have knowledge of but have not been disclosed? Appellant's views are those of every appellate court (save the one in the instant case) passing upon the question[1], and the views generally accepted by text-writers.[2] So far as appellant is aware, in the only Supreme Court case even grazing this particular problem, this court carefully and expressly refrained from passing on the validity of an ordinance excluding churches as not being there in issue (*Euclid* v. *Amber Realty Co.*, 272 U. S. 365).

APPELLEES' ARGUMENTS IN THEIR ANSWER TO PETITION FOR REHEARING ARE MISLEADING AND DISTORT THE ISSUES.

Appellees attack the capacity of appellant, a corporation sole, to raise the constitutional challenge, asking "in what way is the corporation sole a *citizen* whose *privileges and immunities* are violated?" citing Stone, J., in *Hague* v. *C. I. O.*, 307 U. S. 496. This is most misleading. Appellant has not contended in any of its arguments either before this Court or the courts below that it is either a "*citizen*" or entitled to the protection of the "*privileges and immunities*" clause of the Federal Constitution. Its contention has been that the Porterville ordinance in restricting the freedom of religious worship is in violation of Section 1 of the Fourteenth Amendment, which under decisions of this Court have been held to embrace the fundamental rights guaranteed by the First Amendment, namely, free-

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[1] *City of Sherman* v. *Sims (Texas)*, 183 S. W.(2) 415, aff'g, 181 S. W.(2) 100; *Ellsworth* v. *Gercke (Ariz.)*, 156 Pac.(2) 242; *Roman Catholic Archbishop* v. *Baker (Ore.)*, 15 P.(2) 391; *State ex rel. Roman Catholic Bishop* v. *Hill (Nev.)*, 90 Pac.(2) 217; *State ex rel. Synod of Ohio* v. *Joseph (Ohio)*, 39 N. E.(2) 515, 138 A. L. R. 1274.

[2] 138 A. L. R. 1287; Bassett on Zoning, pp. 71-72; Yokley on Zoning Law and Practice (1948), Sec. 183.

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dom of religious worship and freedom of speech and of the press. As to the right of a corporation to challenge an invasion of these constitutional provisions, this Court has spoken in *Grosjean* v. *American Press Co.*, 297 U. S. 233, where there was challenged, under the due process clause of the Fourteenth Amendment, the validity of a state statute on the ground that it abridged the freedom of the press. It was argued that a corporation was without capacity to raise the constitutional question. The Court ruled (p. 244):

> "Appellant contends that the Fourteenth Amendment does not apply to corporations; but this is only partly true. A corporation, we have held, is not a 'citizen' within the meaning of the privileges and immunities clause. *Paul* v. *Virginia*, 8 Wall. 168. But a corporation is a 'person' within the meaning of the equal protection and due process of law clauses, which are the clauses involved here. *Covington & Lexington Turnpike Co.* v. *Sandford*, 164 U. S. 578, 592; *Smyth* v. *Ames*, 169 U. S. 466, 522."

This case has never been departed from so far as we are aware. See *United States* v. *C. I. O.*, 335 U. S. 106, 121-124, and the following from the concurring opinion of Mr. Justice Rutledge, p. 154:

> ". . . There are of course important legal and economic differences remaining between corporations and unincorporated associations, including labor unions, which justify large distinctions between them in legal treatment. But to whatever extent this may be true, it does not follow that the broadside and blanketing prohibitions here attempted in restriction of freedom of expression and assembly would be valid in their corporate applications. Corporations have been held within the First Amendment's protection against restrictions upon the circulation of their media of expression. *Grosjean* v. *American Press Co.*, 297 U. S. 233. It cannot therefore be taken, merely upon legislative assumption, practice or judgment, that restrictions upon freedoms of expression by corporations are

valid. Again, those matters cannot be settled finally until this Court has spoken."

In the event persons who desired and planned and wanted to use the church edifice themselves brought this suit, instead of the Corporation of the Presiding Bishop, manifestly they would have had no status, standing, or interest to enjoin the refusal of the building permit, since they were not applicants for that permit. *Gundling* v. *Chicago,* 177 U. S. 183, 186. The corporation itself is the owner of the property and itself seeks to establish the property for religious uses and purposes. And the question is whether a religious building such as this may be established in a portion of the City of Porterville, or whether the city can exclude it from particular areas. A religious edifice has every bit as much to do with freedom of religion as does the distribution of religious literature. *Murdock* v. *Pennsylvania,* 319 U. S. 105, 108-9, 117. If there is status and standing to raise the question in the latter instance, there is such status and standing with respect to our case.

Appellees argue that the zoning ordinance did not purport to prohibit anyone worshipping, dictate his belief, censor it, etc. Appellees profess inability to see how the prohibition of churches could affect the freedom of religious worship. If the ordinance absolutely prohibited construction of churches in the entire city, would there be any escaping the fact of its interference with religious worship? If the answer be no, will the mere difference that building churches is prohibited in only part of the city, a distinction in *degree* rather than principle, save the ordinance from the same fatal flaw? Can a law be considered valid because it is *just a little* unconstitutional or unconstitutional only to the extent it undertakes to exercise forbidden powers? Here churches, the conventional and orthodox tool of customary worship, are eliminated from the very district with which from time immemorial they have been most

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closely associated. Yet this Court has held in no uncertain terms that *less* conventional and orthodox ways of worship cannot be so restricted. *Murdock* v. *Pennsylvania,* supra.

Appellees assert that it is appellant's position that church buildings be exempted from nondiscriminatory ordinances for public safety and welfare; that appellant's argument if extended would prevent prohibitions against wooden buildings and fire escapes, inadequate ventilation, etc. Appellees further argue that if churches must be permitted, police, fire and sanitary facilities, street paving and parking would not be adequate, and that more expensive police details, larger water and sewer mains, additional water pressures, erection of costly facilities, employment of more personnel would be required. Further in this line, appellees paint a church as a monstrous industrial plant, and picture in glowing terms "bodies of people coming and going", "noise, dust; and traffic", "fumes, flashing of lights and peaks of congestion" (Page 7, Appellees' Answer to Petition for Rehearing).

But if common knowledge is not enough to dispel such a picture as regards a church, the court need only look at the building plans submitted and the map of the City of Porterville. There is no support for such arguments in the record—the case was disposed of below on demurrer to appellant's petition.

And the argument that appellant claims exemption from safety provisions, such as fire hazards, etc., is repudiated by the record. The petition for writ of mandate alleged that the plans and specifications conformed in all respects to the requirements of the Building Code of the City of Porterville, and that the proposed building complied in every particular with such requirements. It was further alleged that the refusal to issue the building permit was for the specific reason that the property where the church was to be located was zoned for single-family dwellings.

While immaterial to the question of the substantiality of the Federal question, appellees also urge that the com-

plaint did not state a cause of action because containing conclusions of law. The specific constitutional provisions relied upon were contained in the complaint to bring the constitutional challenge to the attention of the court at the earliest moment. Every fact necessary for the determination of the constitutionality of the ordinance was pleaded. The decisions cited to support the contention that the complaint was insufficient are not in point. None of these decisions embodied a general challenge to the constitutionality of the respective statutes in question, but merely challenged their applicability to the particular assailant's particular property or set of facts. For example, in *Pacific States Box Co.* v. *White*, 296 U. S. 176, the decision dismissing the bill for not stating a cause of action, was based upon the fact that the challenged law was clearly and admittedly within the police power of the state, under which circumstance this court held that the burden was upon one assailing such a law to show "by a resort to common knowledge or other matters which may be judicially noticed, or other legitimate proof that the action [applying the law in the particular case] is arbitrary." Such a burden was not sustained by making general allegations which were merely general conclusions of law. In *Wilkins* v. *San Bernardino*, 29 Cal. 2d 322, the court specifically pointed out that no claim was advanced that the ordinance itself was invalid, but invalid only as applied to plaintiff's property; the same situation obtains in *Leventhal* v. *District of Columbia*, 100 F. 2d 94. The case at bar, unlike those cases cited, is a direct challenge to the power of a municipality to prohibit churches in residential sections of a city. In other words, the constitutionality of the ordinance as applied to churches is brought into question and not merely the application of the ordinance to appellant's particular property. Must appellant when challenging a statute which on its face restricts religious freedom negative every possible factual situation that the imagination of appellees could conjure as possibly justifying the statute as necessary to prevent a

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clear and present danger of serious substantive evil? The cases do not so hold.

It is respectfully submitted that the Petition for Rehearing should be granted.

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